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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 84

ROBERT D. KEMPER, *Petitioner,*

v.

THE DAYTON BAR ASSOCIATION, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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I. OPINION OF THE COURT BELOW

On November 20, 1963, in a per curiam opinion, reported in 175 O.S. 285, 25 O.O. 2d 117, the Ohio Supreme Court confirmed the final report of the Board of Commissioners on Grievances and Discipline and ordered petitioner permanently disbarred from the pracitce of law. Petitioner filed a motion for rehearing which was overruled on December 18, 1963. On application to Mr. Justice Stewart, the time for filing a response to the Petition for Writ of Certiorari was extended to and including July 14, 1964.

II. JURISDICTION

Petitioner invokes the jurisdiction of this Court under Title 28, Section 1257 of the United States Code.

III. STATEMENT OF FACTS

The following is offered to supplement the petitioner's Statement.

On August 24, 1961, The Dayton Bar Association filed a complaint, applicable parts of which are set forth as Appendix "A" hereof, with the Board of Commissioners on Grievances and Discipline of the Supreme Court of the State of Ohio against the petitioner, Robert D. Kemper, pursuant to Rule XXVII of the Rules of Practice of the Supreme Court of the State of Ohio, the pertinent parts of which appear as Appendix "B" hereof, charging conduct in violation of said Rule and in violation of Rule XXVIII of the Rules of Practice of said Court, which appears as Appendix "C" hereof, and in violation of the Canons of Professional Ethics of the American Bar Association, of which the Court can take judicial notice.

The Supreme Court of Ohio promptly notified Robert D. Kemper of the filing of the complaint, furnished him a copy thereof, and he employed lawyers to represent him in the proceedings. On September 30, 1961, Mr. Kemper filed an answer putting all matters at issue, by denying, generally, some of the allegations and offering explanation to excuse his conduct as to other allegations set forth in the complaint.

By a written notice, dated November 14, 1961, to all parties, the complaint was assigned for the presentation of evidence at Dayton, Ohio, on December 14, 1961.

The matter proceeded to hearing on the date assigned. Evidence was offered in support of the items of the complaint and petitioner's lawyer, and from time to time the petitioner, cross-examined the witnesses. The petitioner took the stand in his own defense and his lawyer took the stand to act as a character witness.

On December 20, 1961, the petitioner made application to the Supreme Court that the Board of Commissioners be reconvened to hear additional evidence in his behalf. On February 2, 1962, the application was granted. On April 4, 1962, all the parties received a written notice that the matter was assigned to permit the submission of additional evidence by Mr. Kemper, commencing on April 17, 1962. At that time, the petitioner offered the evidence of nine witnesses. Mr. Kemper interrogated the witnesses with the assistance of his lawyer.

No claim was made, no evidence was offered and petitioner's conduct did not suggest the possibility, that said Robert D. Kemper was mentally ill prior to or at the times of the trial on December 14, 1961, and April 17, 1962.

On October 18, 1962, the Commissioners filed a final report, entitled "Findings of Fact, Conclusions and Recommendation of Board of Commissioners", in the office of the Clerk of the Supreme Court, the appropriate parts of which are set forth as Appendix "D" hereof, recommending permanent disbarment of the petitioner, and submitted the same for confirmation and the issuance of an order thereon by the Ohio Supreme Court.

On October 19, 1962, the Supreme Court issued an order and mailed the same to Robert D. Kemper order-

ing him to file objections or show cause, before November 28, 1962, why the final report should not be confirmed. The petitioner filed objections to the report, supported by a 28-page brief, on November 24, 1962. No claim was made that petitioner was mentally ill at that time nor at any time prior thereto.

On January 16, 1963, nine months after the April 17, 1962, trial and three months after the filing of the Commissioners' final report, said Robert D. Kemper applied for and was granted admission to The Veterans Administration Hospital at Cincinnati for psychiatric care. The Supreme Court adjourned for its summer recess on June 28, 1963, and on the same day the petitioner discharged himself from The Veterans Administration Hospital.

On September 16 and September 18, 1963, the Clerk of the Supreme Court telephoned counsel for the petitioner and the Bar Association to advise the parties that the matter was assigned for oral argument on the final report of the Commissioners, and the objections thereto.

On September 19, 1963, an application was filed in the Probate Court of Montgomery County, Ohio, suggesting the mental illness of said Robert D. Kemper. On September 25, 1963, said Court found, on the testimony of David Kushnir, a physician engaged in the general practice of medicine, and on the testimony of members of his family and a friend, that there was probable cause to believe petitioner was mentally ill.

The Probate Court ordered petitioner committed to the Dayton State Hospital, an institution for the mentally ill, for examination and treatment, for a period not to exceed ninety days. For lack of room, peti-

tioner was transferred from the Dayton State Hospital to The Veterans Administration Hospital at Cincinnati two days later.

On October 9, 1963, the Supreme Court of Ohio heard the arguments of counsel on the final report of the Commissioners, at which time petitioner's attorney contended that the Court should not consider said final report by reason of the mental illness of said Robert D. Kemper.

On November 20, 1963, the Ohio Supreme Court confirmed the final report of the Commissioners and ordered that petitioner be permanently disbarred from the practice of law.

On December 30, 1963, the Montgomery County Probate Court ordered petitioner transferred from The Veterans Administration Hospital at Cincinnati to the Dayton State Hospital for psychiatric examination.

On January 7, 1964, the Montgomery County Probate Court heard the testimony of the same general practitioner, David Kushnir, and the testimony of Dr. Theodore Sills, the Assistant Superintendent and Director of the Clinic for Dayton State Hospital. Based on that testimony the Court found that petitioner was not mentally ill and not a proper party for hospitalization. The Bar Association did not participate in the proceedings in the Probate Court.

IV. SUMMARY OF ARGUMENT

Mr. Kemper was disbarred for misconduct involving the solicitation of employment as a lawyer, charging excessive fees, attempting to bribe public officials and for attempting to purchase the murder of a client.

The petitioner was informed of the charges which were lodged against him and, with the assistance of lawyers of his choice, participated in the defense which consisted primarily of justification of his conduct. Nine months after the trial and three months after the announcement of the Commissioner's recommendation for disbarment, petitioner claimed that he was mentally ill and that the Ohio Supreme Court should not hear the arguments of counsel respecting the Commissioner's report. The judgment of disbarment, rendered by the Ohio Supreme Court violates no constitutional provisions and is in harmony with decisions rendered by this Court, heretofore.

V. ARGUMENT

The petitioner was disbarred for the following misconduct:

1. For entering a hospital and soliciting employment as a lawyer by a man he did not know (R. 212). The man was under sedation (R. 213). Less than twenty-four hours before Mr. Kemper visited him, he suffered injury in a collision of motor vehicles (R. 202) which required the amputation of both legs the same day (R. 209). The person causing the injury was undeniably negligent (R. 203), financially responsible (R. 207) and the injured person was free of fault. The injured person could write his name but claimed he could not read (R. 202, 225). Mr. Kemper contracted for and received a fee of $45,000.00, fifty percent of the amount of a settlement negotiated shortly after the commencement of the trial of the case (R. 234).

2. For charging a fee which was excessive, extortionate and not reasonable under the circumstances of the case.

3. For attempts to bribe a public official.

4. For offering the sum of $300.00 to another person to murder a client (R. 317) who was disenchanted with Mr. Kemper's conduct in forging her name to settlement drafts issued by two insurance companies.

Evidence respecting the charges and the defense thereto was presented on December 14, 1961, and on April 17, 1962. Mr. Kemper and lawyers of his choice participated in the hearings before the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court. The defense never included a denial of the charges. Mr. Kemper did not deny that he forged his client's name to the insurance drafts. He did not even deny, in fact he admitted, (R. 317) that he offered the sum of $300.00 for the murder of the client when she complained of the forgery. He simply offered explanation in justification of his conduct.

Mr. Kemper had ample notice of the time assigned for each hearing to take evidence. He was given every opportunity to present all of the evidence he wished to offer. He took an active part in questioning the witnesses, testified in his own defense and gave no indication that he was mentally ill. He made no defense that he was mentally ill at the time of the hearings nor at the time of the events described in the complaint.

After the record was closed, memoranda of applicable law and appropriate argument were furnished by the parties. The Commissioners weighed the evidence, made their final report and their recommendations to the Ohio Supreme Court.

The hearing before the Ohio Supreme Court was like hearings before the Supreme Court of the United States, at which the presence of a litigant is permissible

but not indispensable and at which evidence is not offered, not contemplated and not appropriate. The proceedings before the Court were limited to the arguments of counsel. Thereafter, the Court took the matter to deliberate, and then to accept, reject or modify the recommendations of the Commissioners.

Petitioner claims that he was mentally ill at the time of the hearing before the Supreme Court and argues that the hearing, under such circumstances, was a violation of his constitutional rights.

It is not conceded that Mr. Kemper is now or ever was mentally ill. Assuming, only for the purpose of the discussion, that the petitioner was mentally ill, as he claims, mental illness does not and should not serve to bar proceedings to remove Mr. Kemper's license to practice law in the State of Ohio. Disbarment proceedings are civil in nature and are not designed as punishment for the lawyer. Mental illness is a defense in a criminal case. It is not a defense in an action for disbarment. The purpose of disbarment is to protect the public from unscrupulous or dishonest lawyers.

The following Courts have held that insanity is not a bar to an order striking the name of an attorney for misconduct: *In re Kennedy,* 178 Pa. 232, 35 A. 995; *In re Manahan,* 186 Minn. 98, 242 N.W. 548; and *In re Patlak,* 368 Ill. 547, 15 N.E. 2d 309.

Among other things, this Court stated, in the case of *Schware* v. *Board of Bar Examiners,* 353 U.S. 232 at 238, 239:

> "A state cannot exclude a person from the practice of law—in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment."

Mr. Kemper's rights respecting due process were not violated in this case. The proceedings did not transgress statutes or the Constitution of the United States.

The Supreme Court of the State of Ohio adopted rules under which lawyers are licensed to practice law in the State of Ohio and under which the license may be removed. Mr. Kemper's license was granted and it was removed in conformity with the rules of the Court.

The foregoing action is not inharmonious with admonitions of this Court. The admission to practice and the disbarment of attorneys are the exercise of the judicial power. For valid reasons, involving moral or professional delinquency, the admitting court can disbar a lawyer, after it has afforded the lawyer an opportunity to be heard. *Ex parte Garland,* 71 U.S. 333 at 379, sixth and seventh syllabi, 4 Wall. 333 at 379. In the case of *Ex parte Secombe,* 60 U.S. 9 at 13, 19 How. 9 at 13, the Court said:

> ". . . it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed."

The Ohio Supreme Court holds, in the case of *In re McBride,* 164 O.S. 419, 58 O.O. 242, 132 N.E. 2d 113, certiorari denied, 351 U.S. 965, 76 S. Ct. 1030, in the first syllabus:

> "The power to admit attorneys to the practice of law and to disbar, suspend or otherwise discipline them after admission, rests inherently in the judicial branch of the government."

See also *Cleveland Bar Association* v. *Pleasant,* 167 O.S. 325 at 335, 4 O.O. 2d 433 at 438, 148 N.E. 2d

493, certiorari denied, 358 U.S. 842, 79 S. Ct. 33; *Phipps* v. *Wilson,* 186 Fed. 2d 748 (7th Cir.); and *Saier* v. *State Bar of Michigan,* 293 Fed. 2d 756, certiorari denied, 368 U.S. 947, 82 S. Ct. 388.

The Ohio Supreme Court also held in the case of *In re Thatcher,* 83 O.S. 246, 93 N.E. 895, that proceedings to disbar an attorney do not involve punishment for the lawyer; they are civil proceedings, not criminal proceedings (*Konigsberg* v. *State Bar,* 353 U.S. 252 at 257) and disbarment merely removes the extraordinary privilege which was theretofore conferred upon the lawyer by the Court, in reliance on his good character. See also *State, ex rel. Joseph* v. *Crossland,* 152 O.S. 199, 40 O.O. 174, 88 N.E. 2d 289.

The foregoing is in harmony with this Court's ruling in the case of *Ex parte Wall,* 107 U.S. 265, from which we quote, beginning at page 289, to supplement the portion heretofore quoted by the petitioner:

> ". . . The constitutional privilege of trial by jury for crimes does not apply to prevent the courts from punishing its officers for contempt, or from removing them in proper cases. . . . The proceeding is in its nature civil, ... The proceeding is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministration of persons unfit to practice in them. Undoubtedly, the power is one that ought always to be exercised with great caution; and ought never to be exercised except in clear cases of misconduct, which affect the standing and character of the party as an attorney. But when such a case is shown to exist, the courts ought not to hesitate, from sympathy for the individual, to protect themselves from scandal and contempt, and the public from prejudice, by removing grossly improper persons from participa-

tion in the administration of the laws. The power to do this is a rightful one; and *when exercised in proper cases, is no violation of any constitutional provision.*

"It is contended indeed, that a summary proceeding against an attorney to exclude him from the practice of his profession on account of acts for which he may be indicted and tried by a jury is in violation of the Fifth Amendment of the Constitution, which forbids the depriving of any person of life, liberty or property without due process of law. But the action of the Court in cases within its jurisdiction is due process of law. It is a regular and lawful method of proceeding, practiced from time immemorial. Conceding that an attorney's calling or profession is his property, within the true sense and meaning of the Constitution, it is certain that in many cases, at least, *he may be excluded from the pursuit of it by the summary action of the court of which he is an attorney.* . . .

"It is a mistaken idea that due process of law requires plenary suit and a trial by jury, in all cases where property or personal rights are involved. . . .

"The question, what constitutes due process of law within the meaning of the Constitution, was much considered by this Court in Davidson v. New Orleans, 96 U.S. 97; and Mr. Justice Miller, speaking for the Court, said: 'It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issuer affecting it, he has, by the laws of the state, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case.' . . .

"We have seen that, in the present case, due notice was given to the petitioner, and a trial and hearing was had before the Court, in the manner in which proceedings against attorneys, when the

question is whether they should be struck off the roll, are always conducted.

"We think that the Court below did not exceed its powers in taking cognizance of the case in a summary way, and that no such irregularity occurred in the proceeding as to require this Court to interpose . . . ." (Emphasis added).

The interest of the United States Supreme Court in the disbarment of lawyers by the State Court which issued the lawyer's license to practice is usually confined to questions of notice and the lawyer's opportunity to defend against the charges. In the case at bar, Mr. Kemper had notice; he received a copy of the complaint. Mr. Kemper had every opportunity to defend against the charges and did, in fact, defend with the assistance of able, experienced lawyers. In the cases of *Bradwell* v. *Illinois,* 83 U.S. 130, 16 Wall. 130 and *Re Lockwood,* 154 U.S. 116, 14 S. Ct. 1082, this Court held that the right to practice law is not a privilege or immunity within the meaning of the Fourteenth Amendment of the Constitution.

In the more recent case of *Theard* v. *United States,* 354 U.S. 278 at 281, the Court held that it does not, ordinarily, sit in judgment on decisions involving state questions or to review judgments of disbarment rendered by a State Court and added:

"The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control of the conduct of their officers, among whom, in the present context, lawyers are included. The court's control over a lawyer's professional life derives from his relation to the responsibilities of a court. The matter was compendiously put by Mr. Justice Cardozo while Chief Judge of the New York Court of Appeals.

'"Membership in the bar is a privilege burdened with conditions" (matter of *Rouss,* 221 N.Y. 81, 84, 116 N.E. 782, 783). The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice.' *People ex. rel. Karlin* v. *Culkin,* 248 N.Y. 465, 470-471, 162 N.E. 487, 489. The power of disbarment is necessary for the protection of the public in order to strip a man of the implied representation by courts that a man who is allowed to hold himself out to practice before them is in 'good standing' so to do."

VI. CONCLUSION

The practice of law is not a nantral, inherent, vested right, guaranteed by the Constitution. Mr. Kemper enjoyed a privilege which was limited by the rules, defining misconduct, adopted by the grantor, the Ohio Supreme Court. His condition of mental health is not the factor about which the primary question circulates. The primary question involves the public interest and whether the public is harmed or is likely to be harmed by Mr. Kemper's abuse of his license to practice. He was guilty of the most serious misconduct. The Court did not abuse its discretion, it exercised it wisely in recalling his license. The judgment of the Ohio Supreme Court is in harmony with the decisions of this Court. The requirements of due process have been met.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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